STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

Cbeyond Communications, LLC	)	
-vs-	)	
Illinois Bell Telephone Company d/b/a	)	
AT&T Illinois	)	
	)	**Docket No. 11-0696**
Formal Complaint and Request for	)	
Declaratory Ruling pursuant to	)	
Sections 13-515 and 10-108 of the	)	
Illinois Public Utilities Act	)	
	)	
	)	

VERIFIED MOTION TO DISMISS CBEYOND'S REQUEST
FOR DECLARATORY RULING AND FORMAL COMPLAINT

Illinois Bell Telephone Company ("AT&T Illinois"), by and through its attorneys, hereby moves to dismiss the Request for Declaratory Ruling and Formal Complaint ("Complaint") filed by Cbeyond Communications, LLC ("Cbeyond"). The Complaint is the latest attempt by Cbeyond to avoid paying certain charges for services provided by AT&T Illinois pursuant to the parties' interconnection agreement ("ICA"). Cbeyond's latest Complaint both resorts to claims already raised before and rejected by the Commission in Docket No. 10-0188, and asserts new claims that Cbeyond has never raised in the informal dispute resolution process required by the parties' interconnection agreement ("ICA"). And like Cbeyond's prior complaint in Docket No. 10-0188, which was denied in its entirety, this Complaint is long on rhetoric and short on specific allegations about how AT&T Illinois' conduct has breached any provision of the ICA or violated state or federal law.

Cbeyond's latest Complaint challenges AT&T Illinois' charges for the provision of Clear Channel Capability ("CCC"). The challenged charges fall into two categories. The first category (which AT&T Illinois will refer to as Category 1 charges) includes CCC charges

associated with the "rearrangement" or "grooming" of DS1 enhanced extended links ("EELs"). The second category (Category 2 charges) includes CCC charges associated with the initial provision of a DS1 circuit.

Cbeyond's Complaint should be dismissed as to both categories of charges. The propriety of the Category 1 charges was already challenged by Cbeyond and ruled upon by this Commission in Docket No. 10-0188. The Commission denied Cbeyond's complaint in full, finding that Cbeyond failed to prove that *any* of the charges at issue in that docket violated the parties' ICA or the Illinois Public Utilities Act ("PUA"). Cbeyond did not appeal from that decision, and cannot use a new proceeding to collaterally attack the Commission's final order in Docket No. 10-0188.

As to the Category 2 charges, Cbeyond's Complaint is premature because Cbeyond has failed to comply with the informal dispute resolution provision in the parties' ICA. The ICA requires the parties to engage in, at a minimum, 60 days of informal dispute resolution prior to filing a formal complaint at this Commission. Cbeyond cannot legitimately claim that the parties are at an impasse over these charges – and certainly cannot seek punitive damages and penalties based on these charges – when it has failed to follow the prescribed path for addressing the dispute on an informal, party-to-party basis.

Because Cbeyond's challenge to the Category 1 charges has already been rejected by the Commission and its challenge to the Category 2 charges is premature, all four counts of Cbeyond's Complaint should be dismissed. Each count of the Complaint is subject to dismissal for additional reasons, as well.

Counts One, Two and Three should be dismissed because Cbeyond's billing dispute must be decided by reference to the parties' ICA, *not* state or federal law. In Counts One, Two and

Three, Cbeyond alleges that AT&T Illinois has violated various provisions of the PUA – specifically, sections 13-514, 13-801, and 9-250 – by charging Cbeyond CCC charges when providing DS1s and when converting Cbeyond's DS1 EELs to new serving arrangements. However, the central and dispositive issue in this case is whether AT&T Illinois' charges are authorized by the parties' ICA. The ICA contains the exclusive statement of the respective rights and obligations of Cbeyond and AT&T Illinois, and the provisions of state law relied upon by Cbeyond are irrelevant to the parties' dispute. To the extent that Cbeyond alleges that state law requires AT&T Illinois to go above and beyond what is required of it in the ICA, or to conduct itself contrary to the ICA's terms, state law is preempted.

Count One of the Complaint, for violation of section 13-514 of the PUA, should also be dismissed, as to the Category 1 charges, because complaints under section 13-514 are governed by the Commission's "fast track" process, set forth in section 13-515 (*see* 220 ILCS 5/13-515). Cbeyond explicitly waived its right to bring a fast-track complaint relating to any of the charges that were at issue in Docket No. 10-0188.

Count Two of the Complaint, for violation of section 13-801 of the PUA, should be dismissed for the additional reason that it fails to state a claim. Section 13-801 requires interconnection, collocation and network elements to be provided at cost-based rates. Cbeyond never alleges, however, that the CCC charges imposed by AT&T Illinois are anything other than cost-based. Instead, Cbeyond raises a question about whether CCC charges are applicable at all under the particular circumstances of this case. Cbeyond's allegations simply do not implicate section 13-801.

Count Three of Cbeyond's Complaint, based on section 9-250 of the PUA, should also be dismissed based on its failure to state a claim for which relief can be granted. Section 9-250

authorizes the Commission to investigate a carrier's rates, charges and practices and to impose different rates, charges and practices that it deems to be just and reasonable. Section 9-250 has no application in this case, because the parties' rights and obligations are set forth in the binding ICA and can only be enforced – not modified – by the Commission.

Count Four of the Complaint, for breach of the ICA, also fails to state a claim. Cbeyond's vague and conclusory allegations, which are not tied to any specific provisions of the ICA, make it impossible to identify the particular breach Cbeyond is claiming. Cbeyond is using the same tactic here that it used to frustrate the proceedings in Docket No. 10-0188 – failing to identify the contractual source of the breach of ICA claim in the Complaint, and then repeatedly shifting its theory as the case develops. Cbeyond should not be allowed to engage in such gamesmanship and waste the time and resources of this Commission and AT&T Illinois.

Finally, Cbeyond's claims for various types of damages and penalties are frivolous and should be stricken from the Complaint.

Background

In 2010, Cbeyond filed a complaint (Docket No. 10-0188)[1] challenging AT&T Illinois' non-recurring charges related to what Cbeyond calls "EEL rearrangement" or "EEL grooming." *See* Ex 2 at 15-16 (Docket No. 10-0188 Complaint).[2] One of the types of charges Cbeyond specifically challenged in that docket was CCC, which was mentioned in no fewer than six places in that complaint (Ex. 2, ¶¶ 30, 34, 35, 36, 37, 38), and discussed at length in the parties' briefs. *See* Ex. 3 at 23, 28-29 (AT&T Initial Brief); Ex. 4 at 5 (Cbeyond Initial Brief); Ex. 5 at

[1] This Commission may take administrative notice of materials from Docket No. 10-0188, including those materials attached as exhibit hereto. *See* 83 Ill. Admin. Code 200.640(a)(2) (authorizing Commission to take administrative notice of "the orders, transcripts, exhibits, pleadings or any other matter contained in the record of other docketed Commission proceedings"). The Final Order in Docket No. 10-0188 is attached as Exhibit 1.

[2] These grooming projects involve Enhanced Extended Links (or "EELs") consisting of a DS1 loop and DS1 transport, which Cbeyond wants to replace either with a DS1 loop combined with DS3 transport or with a DS1 loop connected to transport provided by Cbeyond or a third party. *See* Ex. 1 at 28.

30, 41-42 (AT&T Reply Brief); Ex. 6 at 20-21, 25-27 (Cbeyond Reply Brief); Ex. 7 at 2, 18-19 (Cbeyond Brief on Exceptions); Ex. 8 at 15-17 (AT&T Response to Exceptions). Like its latest Complaint, Cbeyond's complaint in Docket No. 10-0188 alleged that AT&T Illinois' charges constituted a breach of the parties' ICA and also violated sections 13-514, 13-801, and 9-250 of the PUA. 220 ILCS 5/13-514, 13-801 and 9-250. After extensive discovery and briefing on the merits, the Commission dismissed Cbeyond's complaint in full, finding that "Cbeyond has not shown that AT&T Illinois has acted improperly in the past with respect to the charges at issue here." Ex. 1 at 33. The Commission also stated: "Now that the dispute has been resolved by the Commission in favor of AT&T, the Commission sees no reason to stop AT&T from pursuing Cbeyond for the amounts billed." *Id*. at 35. Cbeyond did not appeal from the Commission's order.

Following the release of the final order on July 7, 2011, AT&T Illinois waited for Cbeyond to pay the charges at issue in Docket No. 10-0188. By August 23, 2011, Cbeyond still had not done so. Therefore, AT&T Illinois sent a letter to Cbeyond stating that AT&T Illinois intended to exercise its contractual right to suspend new ordering and to disconnect service based on Cbeyond's non-payment of the $423,040.59 in charges listed in Exhibit A to the Docket No. 10-0188 Complaint ("Exhibit A").[3] In response, Cbeyond filed suit in Cook County Circuit Court (No. 11 CH 30266) to obtain a temporary restraining order ("TRO") against AT&T Illinois. *See* Ex. 9 (TRO Motion). In the TRO Motion, Cbeyond recognized that "[i]n July, 2011, the Illinois Commerce Commission . . . resolved Cbeyond's principal billing question," which was "whether AT&T improperly imposed disconnection and reconnection fees and charges on Cbeyond." *Id.* ¶ 5. However, according to Cbeyond, "the Commission's ruling did

[3] Exhibit A was filed by Cbeyond under seal, marked Proprietary, but this dollar amount was mentioned in Cbeyond's publicly filed TRO Motion in the Cook County Circuit Court.

not address . . . the parties' dispute with respect to the accuracy of the amounts billed by AT&T." *Id.* (emphasis by Cbeyond).

Seeking to avoid the expenditure of time and resources needed to litigate a TRO, the parties entered into an "Agreement Regarding Disputed Amounts." Ex. 10 ("Agreement"). In the Agreement, Cbeyond committed to escrow the total amount of the AT&T Illinois charges it disputed, $423,040.59, as set forth in Exhibit A. *Id.* ¶ 1. Cbeyond would then have until September 9, 2011, to "advise AT&T of each specific charge . . . which Cbeyond asserts was not accurately billed (the 'Disputed Charges'), identify all bases for its assertion, and set forth the amount, for each such charge, that it believes should have been billed." *Id.* ¶ 3. If the parties could not fully resolve Cbeyond's disputes concerning the accuracy of the bills, then Cbeyond would "bring a complaint proceeding before the Illinois Commerce Commission . . . by no later than October 24, unless the parties mutually agree[d] in writing to a later date." *Id.* ¶ 5.

The parties expressly agreed that any such "proceeding before the Illinois Commerce Commission shall *not* be designated by a fast-track proceeding." *Id.* (emphasis added). The Agreement also made clear that AT&T Illinois was not agreeing that Cbeyond had any right to challenge the billings that were already disputed and considered in Docket No. 10-0188. The Agreement provides, in relevant part: "The parties specifically reserve all arguments they may have with respect to the charges set forth in Exhibit A, and do not, by virtue of anything in this agreement, hereby waive such arguments. The parties specifically acknowledge that AT&T Illinois is not, by this agreement, waiving any arguments it may have that Cbeyond has waived its right to dispute the accuracy of the charges set forth in Exhibit A [to the Complaint in Docket No. 10-0188]." *Id.* ¶ 7.

On September 9, 2011, Cbeyond informed AT&T Illinois, by email, that it was not disputing "the accuracy of all billed and withheld loop provisioning and service ordering nonrecurring charges (NRCs) associated with EEL grooming projects that occurred on invoices dated from December 2005 through February 2010 . . . for which it had previously withheld payment" and that Cbeyond would release from escrow $353,690.99. Ex. 11. Cbeyond asserted, however, that it was "disput[ing] the accuracy of all billed clear channel capability ('CCC') NRCs *associated with EEL grooming projects* that occurred on invoices dated from December 2005 through February 2010[.]" *Id.* (emphasis added). Cbeyond did not indicate that CCC charges billed in any context other than those associated with EEL grooming projects were at issue. Nor did AT&T's September 23, 2011 response to Cbeyond's email. *See* Ex. 12.

On October 10, 2011, Cbeyond informed AT&T Illinois by letter that the parties were at an impasse regarding "AT&T's assessment of Clear Channel Capability (CCC) nonrecurring charges." Ex. 13. The generic language in the letter did not distinguish between the $69,349.60 in CCC charges for EEL rearrangements described in Cbeyond's September 9 email (Category 1 charges) and CCC charges in any other context. *See id.* On October 20, 2011, Cbeyond sent counsel for AT&T Illinois a 48-hour notice pursuant to 220 ILCS 5/13-315(c). Ex. 14.[4] Curiously, the letter said nothing about CCC charges associated with EEL "grooming" or "rearrangements," which were addressed in Docket No. 10-0811 and by the Agreement. *See id.* Instead, Cbeyond claimed that the dispute concerned "AT&T Illinois' improper application of [CCC] nonrecurring charge[s] to new circuits, as provided in ICC Docket No. 02-0864." *Id.*

AT&T Illinois responded to Cbeyond's "48-hour letter" the next day, October 21, 2011. AT&T Illinois explained that it was "uncertain about the exact nature of the dispute that

[4] Cbeyond alleges that this letter is Exhibit A to its Complaint. *See* Complaint ¶ 3. The Complaint has no such exhibit, however.

Cbeyond is now raising," because "[t]he discussions in which the companies engaged over the last two months . . . involved nonrecurring CCC charges associated with what Cbeyond described as 'EEL grooming projects,'" whereas the October 20 letter referred only to the CCC rate applicable to *new* DS1 circuit orders. Ex. 15. Cbeyond did not respond to AT&T Illinois' letter. Instead, on October 24, 2011, Cbeyond filed its Complaint in this Commission.[5] Contrary to the parties' express Agreement otherwise (Ex. 10, ¶ 5), Cbeyond filed the Complaint as a fast track proceeding under 220 ILCS 5/13-515.

The Complaint, like Cbeyond's impasse letter and 48-hour letter, is unclear as to the exact nature of the CCC charges Cbeyond is challenging. It appears, however, that Cbeyond seeks to challenge both CCC charges associated with EEL "grooming" or "rearrangement" – the Category 1 charges that were addressed in Docket No. 10-0188 – *and* CCC charges associated with the initial purchase of DS1 circuits – the Category 2 charges that were specifically disputed for the first time in Cbeyond's 48-hour letter. *See* Complaint ¶¶ 28-32. According to the Complaint, AT&T Illinois' imposition of the CCC charges constitutes a breach of the parties' ICA (Count Four) and a violation of sections 13-514, 13-801, and 9-250 of the Illinois Public Utilities Act (Counts One, Two and Three, respectively). In its prayer for relief, Cbeyond requests declaratory relief, an order requiring AT&T Illinois to cease and desist its allegedly improper conduct, plus "direct, proximate and consequential damages, attorney fees and all other costs," and a statutory penalty. Complaint at 15-16. The request for attorneys fees, costs and a penalty reflect remedies only available under the fast-track statute. *See* 220 ILCS 5/13-516.

[5] Cbeyond claims that "AT&T Illinois was provided a copy of this pleading at least 48 hours before its filing." Complaint ¶ 4. That assertion is false. AT&T Illinois did not receive a copy of the Complaint until after it was filed with the Commission.

Argument

I. Cbeyond's Challenge to the Category 1 Charges Should Be Dismissed Because The Commission Already Considered And Rejected That Challenge In Docket No. 10-0188, from Which Cbeyond Chose Not to Appeal.[6]

In its Complaint, Cbeyond recognizes that it already "raised the application of the CCC rate in Docket No. 10-0188 in the context of EEL rearrangements, both in briefing and in exceptions to the Proposed Order." Complaint ¶ 30. In its Docket No. 10-0188 Complaint, in fact, Cbeyond raised the CCC rate in no fewer than six places. Ex. 2, ¶ 35 ("The DS1 Clear Channel Charge is applicable to format a DS1 loop to transmit a clear channel bit stream. When a previously installed DS1 Clear Channel Loop is cross connected to new transport, Illinois Bell does no work to establish or re-establish clear channel on a loop."); ¶ 37 ("There is . . . no provision in the parties interconnection agreement that authorizes Illinois Bell to charge Cbeyond the $70.32 initial or $8.87 additional DS1 Clear Channel installation charges, when Illinois Bell cross connects previously installed loops to new transport"); ¶ 38 ("the $70.32 and $8.87 Clear Channel charges to change the transport portion of an EEL are inappropriate, unlawful and a violation of Cbeyond's Interconnection Agreement"); *see also id.* ¶¶ 30, 34, 36 (also discussing CCC).

Yet, despite repeatedly raising the CCC issue in Docket No. 10-0188, Cbeyond has the audacity to claim that it should be allowed to reargue its challenge to the Category 1 charges. Cbeyond claims that "[t]he Commission's decision in 10-0188 did not approve AT&T Illinois' practice of billing the CCC rate on either the specific charges at issue in that docket, or new charge[s] being assessed by AT&T Illinois on DS1 loops provisioned since the filing of that complaint." *Id*. But in fact, the Commission *did* decide the CCC issue, and Cbeyond lost, with

[6] As set forth herein, Cbeyond's complaint is subject to dismissal on numerous grounds. The arguments raised in Sections I, II, IV and VI are akin to arguments raised pursuant to 735 ILCS 5/2-619. The arguments raised in Sections III and V are akin to arguments that would be brought under both 735 ILCS 5/2-615 and 5/2-619.

the Commission concluding that Cbeyond failed to meet its burden to prove that any of the challenged charges were improper.[7] In the Final Order, the Commission described the CCC issue (Ex. 1 at 15, 17, 25, 27) and properly concluded that "Cbeyond has not shown that AT&T has violated the parties' ICA" (*id*. at 29). *See also id.* at 33 ("Cbeyond has not shown that AT&T has acted improperly in the past with respect to the charges at issue here."). The Commission also stated that "[n]ow that this dispute has been resolved by the Commission in favor of AT&T, the Commission sees no reason to stop AT&T from pursuing Cbeyond for the amounts billed." *Id*. at 35. The Commission made no exception, explicitly or implicitly, for CCC charges.

Thus, it is disingenuous for Cbeyond to claim that CCC charges were not at issue in Docket No. 10-0188. The Commission was not required to address Cbeyond's claim about CCC charges in any further detail than it did. *See, e.g., Abbott Labs., Inc. v. Illinois Commerce Comm'n*, 289 Ill. App. 3d 705, 716 (1st Dist. 1997) ("The Commission is not required to make particular findings as to each evidentiary fact or claim, nor is the Commission required to disclose its mental operations."); Order, *Commonwealth Edison Co. Proposal to Establish Rate CS, Contract Service*, Docket No. 93-0425, 1994 Ill. PUC Lexis 260, at *66, 153 P.U.R. 4th 151 (June 15, 1994) ("neither the Act, the Code, nor case law require[s] the Proposed Order to discuss every argument of every party on every material issue").

In short, Cbeyond raised its challenge to the CCC charges in Docket No. 10-0188, but failed to show that the charges violated the parties' ICA or any other provision of law. If Cbeyond was unsatisfied with the Commission's consideration of the CCC charge issue, the proper recourse was to file an appeal from the Commission's decision. Cbeyond chose not to do so, and is now bound by the decision. *See, e.g., Albin v. Illinois Commerce Comm'n*, 87 Ill. App.

[7] Contrary to Cbeyond's implication, it was not necessary for the Commission to "approve AT&T Illinois' practice of billing the CCC rate." Complaint ¶ 30. *Cbeyond*, as the Complainant, bore the burden of proving that AT&T Illinois' billing practices violated the ICA. Cbeyond failed to do so, warranting the denial of its Complaint.

3d 434, 438 (4th Dist. 1980) (holding that intervenors waived right to challenge Commission's grant of certificate of public and convenience and necessity to power company "by their failure to appeal" from the Commission order granting certificate and explaining that order was "not subject to collateral attack" in a subsequent proceeding); *Citizens for a Better Env't v. Illinois Wood Energy Partners, L.P.*, Docket No. 92-0274, 1995 WL 17200504 (ICC Nov. 22, 1994) (slip op.) (granting utility's motion to dismiss complaint challenging its facility's classification as a "qualified solid waste energy facility" on the basis that the "complaint is a collateral attack on a duly entered Order to which no appeal was taken" and "[t]he matters raised in the complaint should have been raised in [the earlier] Docket").

As this Commission has explained, "[i]t is fundamental that prior decisions should not be overturned by later decisions without good cause or a compelling reason." *In re Illinois Bell Telephone Co.*, Docket No. 05-0697, 2006 WL 2380606 (ICC July 26, 2006) (slip op.). "If 'there are no findings that there were any errors of law or fact in the [original] order, or that facts or circumstances have changed[,] the Commission [i]s without authority to effectively rescind' its prior orders" – which is exactly what the Commission would be doing were it to entertain Cbeyond's challenge to the Category 1 charges. *Id*. (quoting *Union Elec. Co. v. Illinois Commerce Comm'n,* 39 III. 2d 386, 395 (1968) (reversing ICC order that had tried to rescind prior order granting certificate)). *See also Illini Coach Co. v. Illinois Commerce Comm'n*, 408 Ill. 104, 111-12 (1951) (holding that carrier's complaints filed with Commission, which sought to vacate prior Commission order denying carrier's application for certificate of convenience and necessity and which was filed after statutory times for rehearing and appeal elapsed, constituted an improper collateral attack on the prior order, which the ICC properly refused to hear); *Citizens Utilities Company Of Illinois Proposed General Increase In Water and Sewer Rates*, Docket No.

84-0237, 1985 WL 1094359 (ICC Mar. 13, 1985) (slip op.) (rejecting Citizens' argument concerning offsetting payments in lieu of revenues where "the offset argument by Citizens amounts to nothing more than a collateral attack on the Commission's decisions in past rate cases").

In its Complaint, Cbeyond implies that AT&T Illinois agreed that Cbeyond could reassert arguments that were already raised and rejected in Docket No. 10-0188. Specifically, Cbeyond asserts that the parties "agreed on August 29, 2011 that any unresolved issues remaining in dispute over billings arising from the 'EEL rearrangements' litigated in ICC Docket No. 10-0188, which the parties could not resolve by negotiation, would be brought to this Commission by Complaint no later than October 24, 2011." Complaint ¶ 31. Cbeyond blatantly misrepresents the parties' Agreement. The parties entered into the Agreement only after Cbeyond refused to pay the charges upheld in AT&T Illinois' favor in Docket No. 10-0188, and filed a TRO with the Cook County Circuit Court seeking to enjoin AT&T Illinois from enforcing its contractual rights under the ICA. In the Agreement, AT&T Illinois made abundantly clear that it was *not* agreeing that Cbeyond had a right to challenge anew the CCC charges that were already considered in Docket No. 10-0188. The Agreement provides, in relevant part: "The parties specifically reserve all arguments they may have with respect to the charges set forth in Exhibit A, and do not, by virtue of anything in this agreement, hereby waive such arguments. The parties specifically acknowledge that AT&T Illinois is not, by this agreement, waiving any arguments it may have that Cbeyond has waived its right to dispute the accuracy of the charges set forth in Exhibit A." Ex. 10, ¶ 7.

Moreover, even if the Agreement did authorize Cbeyond to further challenge CCC charges related to EEL "rearrangements" – which it does not – the Agreement says only that

Cbeyond will identify charges that were "not *accurately billed*." *Id.* ¶ 3 (emphasis added).[8] In this proceeding, Cbeyond is not attempting to challenge the accuracy of AT&T Illinois' bills at all. Instead, Cbeyond is challenging the legal and contractual bases for the CCC charges. These issues were already brought before the Commission in Docket No. 10-0188. If Cbeyond was unsatisfied with the resolution of the issues there, its remedy was to file an appeal. Cbeyond has no right to relitigate legal arguments already rejected by the Commission.

II. Cbeyond's Challenge To The Category 2 Charges Is Premature Because Cbeyond Failed To Follow The Informal Dispute Resolution Provisions Mandated By The Governing Interconnection Agreement.

While Cbeyond's challenge to the Category 1 charges is barred by the Commission's decision in Docket No. 10-0188, its challenge to the Category 2 charges is not yet ripe for consideration by this Commission. Cbeyond's Complaint should be dismissed to the extent that it challenges CCC charges related to initial DS1 orders, because Cbeyond did not follow the informal dispute resolution ("IDR") process required by the ICA.

Section 1.9.3 of the ICA's General Terms and Conditions sets forth the IDR process to be used by the parties. First, "[u]pon receipt by one Party of written notice of a dispute, including billing disputes, each Party will appoint a knowledgeable, responsible representative to meet and negotiate in good faith to resolve any dispute arising under this Agreement." Ex. 16, § 1.9.3.1. In this case, Cbeyond never requested IDR concerning the Category 2 charges, and the two companies never had a negotiation session focused on resolution of those charges. In September 2011, following Cbeyond's filing of the Cook County complaint, the parties did negotiate concerning the disputed charges set forth in Exhibit A to the Docket No. 10-0188 complaint. But

[8] Indeed, in the TRO Motion it filed in Cook County Circuit Court, Cbeyond expressly recognized that "[i]n July, 2011, the Illinois Commerce Commission . . . resolved Cbeyond's principal billing question" – which was "whether AT&T improperly imposed disconnection and reconnection fees and charges on Cbeyond" – but asserted that "the Commission's ruling did not address . . . the parties' dispute with respect to the accuracy of the amounts billed by AT&T." Ex. 9, ¶ 5 (emphasis by Cbeyond).

those negotiations did not specifically consider the Category 2 charges, which relate to new DS1s, and concerned only the EEL arrangements litigated in Docket No. 10-0188.

The ICA next provides that, "[i]f the Parties are unable to resolve a dispute through the informal procedures described above, then either Party may invoke the Formal Resolution of Disputes or the Parties may agree to invoke Arbitration processes set forth below." Ex. 16, § 1.9.3.2. "Unless the Parties otherwise agree, Formal Resolution of Disputes processes, including arbitration or other procedures as appropriate, may be invoked *not earlier than sixty (60) days after the date of the letter initiating informal dispute resolution* under this Section 1.9.3." *Id.* (emphasis added). Cbeyond did not comply with this provision, either. The first time Cbeyond informed AT&T Illinois that it was specifically challenging CCC charges related to initial DS1 orders was October 20, 2011. Ex. 14. On that date, Cbeyond sent AT&T Illinois a letter stating that the parties were at an impasse and that the letter constituted 48-notice pursuant to 220 ILCS 5/13-315(c). *Id.* To AT&T Illinois' surprise, Cbeyond claimed that the parties' dispute concerned "AT&T Illinois' improper application of [CCC] nonrecurring charge[s] to new circuits, as provided in ICC Docket No. 02-0864." *Id.* The letter said nothing about CCC charges associated with EEL "grooming" or "rearrangements." *Id.* Although AT&T Illinois immediately responded to Cbeyond's letter – explaining that it was "uncertain about the exact nature of the dispute that Cbeyond is now raising," because "[t]he discussions in which the companies engaged over the last two months … involved nonrecurring CCC charges associated with what Cbeyond described as 'EEL grooming projects'" to existing DS1 EELs – Cbeyond did not reply and instead filed its Complaint with this Commission. Ex. 15.

Thus, Cbeyond has failed to comply with the ICA's requirement that the parties engage in at least 60 days of IDR prior to initiating a formal dispute, whether in the Commission or

before a private arbitrator. *See* Ex. 16, § 1.9.5. Cbeyond's Complaint should therefore be dismissed to the extent that it challenges the Category 2 charges.

III. Counts One Through Three Fail To State A Claim Because The Parties' Relationship Is Governed By Their Interconnection Agreement, Not State Law.

Because Cbeyond waited too long to dispute certain charges (the Category 1 charges) and prematurely disputed other charges (the Category 2 charges), all four counts of its Complaint are subject to dismissal. The first three counts of Cbeyond's claim are subject to dismissal for another reason: the Complaint must be decided, if at all, by reference to the parties' ICA, and the provisions of state law relied upon by Cbeyond are irrelevant to the Commission's determination. While AT&T Illinois recognizes that the Commission has jurisdiction to entertain breach of ICA claims, in doing so, the Commission must apply the terms and conditions found in the ICA, not some other, independent source of authority.

The relationship between AT&T Illinois and Cbeyond is governed by their ICA, the "Congressionally prescribed vehicle for implementing the substantive rights and obligations set forth" in the Telecommunications Act of 1996 ("1996 Act"). *Michigan Bell Tel. Co. v. Strand*, 305 F.3d 580, 582 (6th Cir. 2003). The 1996 Act's "regime for regulating competition in th[e] [telecommunications] industry is federal in nature . . . and while Congress has chosen to retain a significant role for the state commissions, the scope of that role is measured by federal, not state law." *Southwestern Bell Tel. Co. v. Connect Commc'ns Corp.*, 225 F.3d 942, 946 (8th Cir. 2000). Pursuant to federal law, "the authority granted to state regulatory commissions is confined to the role described in § 252 [of the 1996 Act] – that of arbitrating, approving, and enforcing interconnection agreements." *Pacific Bell v. Pac West Telecomm, Inc.*, 325 F.3d 1114, 1126 (9th Cir. 2003). "Once the terms [of the ICA] are set, either by agreement or arbitration, and the state commission approves the agreement, it becomes a binding contract." *Id.* at 1120.

See also 47 U.S.C. § 252(a)(1) (carriers may "negotiate and enter into a binding [interconnection] agreement").

After the ICA is approved, the contracting parties are "regulated directly by the interconnection agreement." *Law Offices of Curtis V. Trinko LLP v. Bell Atl. Corp.*, 305 F.3d 89, 104 (2d Cir. 2002), *rev'd in part on other grounds sub nom., Verizon Commc'ns, Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004). *See also Michigan Bell Tel. Co. v. MCImetro Access Trans. Servs., Inc.*, 323 F.3d 348, 359 (6th Cir. 2003) ("once an agreement is approved," the parties are "governed by the interconnection agreement" and "the general duties of [the 1996 Act] no longer apply"). Thus, once approved, the interconnection agreement is the exclusive statement of the parties' rights and obligations – and both federal *and* state law operating of their own force are irrelevant. *See, e.g., Goldwasser v. Ameritech Corp.*, No. 97 C 6788, 1998 WL 60878, at *11 (N.D. Ill. Feb. 4, 1998) (dismissing claims for violation of sections 251, 252, 271 and 272 of the 1996 Act, because telecommunications company's "duties exist . . . only within the framework of the negotiation/arbitration process which the Act establishes to facilitate the creation of local competition"; explaining that "[i]f there are problems with carriers . . . failing to satisfy the[] duties to their competitors [under section 251 and 252 of the 1996 Act], the Act establishes the sole remedy: state PUC arbitration and enforcement proceedings, with review by federal courts"), *aff'd on other grounds*, 222 F.3d 390 (7th Cir. 2000).

This Commission does not have authority – under any provision of federal or state law – to modify the approved, binding ICA between AT&T Illinois and Cbeyond to allow Cbeyond to pay different rates or be subject to different conditions than those set forth in the contract. Simply put, "this Commission cannot take action" that will "effectively change[] the terms of

[the] interconnection agreement[]," because that would "contravene[] the Act's mandate that interconnection agreements have the binding force of law." *Pac West Telecomm,* 325 F.3d at 1127. As the Illinois Appellate Court has explained, "[n]othing in the [Illinois Public Utilities] Act, even the independent authority for alternative regulation . . . , gives the Commission the power to controvert federal law." *Illinois Bell Tel. Co. v. Illinois Commerce Comm'n*, 352 Ill. App. 3d 630, 638-39 (3d Dist. 2004) (Commission order that extended wholesale performance remedy plan to CLECs that did not have interconnection agreements with telephone company, as part of alternative regulation plan, was preempted by 1996 Act; access to remedy plan subverted negotiation and arbitration process required by 1996 Act); *see also Illinois Bell Tel. Co. v. Illinois Commerce Comm'n,* 343 Ill. App. 3d 249, 257 (3d Dist. 2003) (tariff that telephone company was ordered to file by the ICC conflicted with federal law regarding interconnection agreements in the 1996 Act; tariff allowed any CLEC that did not have interconnection agreements to opt into the tariff without having to negotiate, mediate, or arbitrate with telephone company, and thus, telephone company lost its right of federal district court review).

Thus, state law is simply not applicable to the Commission's decision in this case, except to the extent that it provides the general principles of contract law used to interpret the ICA. The Commission need only decide whether AT&T Illinois breached the ICA. To the extent that Cbeyond claims that state law imposes obligations on AT&T Illinois above and beyond, or even contrary to, what the parties agreed to in their ICA, the state law is preempted. *See, e.g.*, *Wisconsin Bell v. Bie,* 340 F.3d 441, 444 (7th Cir. 2003) (state tariffing requirement, which "interfer[ed] with the procedures established by the [1996] [A]ct" for negotiating and arbitrating interconnection agreements, was preempted); *AT&T Commc'ns of Illinois, Inc. v. Illinois Bell Tel. Co*., 349 F.3d 402, 410-11 (7th Cir. 2003) (Illinois statute, mandating methodology for ICC

to use in setting rates, was preempted by the 1996 Act; state methodology, which required consideration of only two factors, conflicted with TELRIC methodology, which was established by the FCC to determine rates under the 1996 Act); *Illinois Bell Tel. Co. v. Hurley*, No. 05 C 1149, 2008 WL 239149, at *7 (N.D. Ill. Jan. 28, 2008) ("Because § 13-801 requires unbundling of AT&T Illinois' network elements to the Competing Carriers, even in situations in which § 251 of the Act do[es] not require the providing of unbundled access to unimpaired CLECs, . . . the court holds that § 13-801 impermissibly preempts the Act[.]"). Counts One, Two and Three of the Complaint therefore should be dismissed.

IV. Count One of the Complaint Should Be Dismissed, As To The Category 1 Charges, Because Cbeyond Contractually Waived Any Right To Bring A Fast-Track Complaint Challenging Charges At Issue In Docket No. 10-0188.

In Count One of the Complaint, Cbeyond alleges that AT&T Illinois has violated section 13-514(10) of the PUA. Section 13-514 is part of the PUA's "fast track" provisions, for which section 13-515's "expedited procedures shall be used." *Id*. § 5/13-515(a). *Cf*. Ex. 1 at 30 ("13-515 is a procedural statute that attaches to [section] 13-514"). However, the parties expressly agreed that any "proceeding before the Illinois Commerce Commission" challenging the charges at issue in Docket No. 10-0188 – *i.e.* the Category 1 charges – "shall *not* be designated by a fast-track proceeding." Ex. 10, ¶ 5 (emphasis added). As Cbeyond's counsel Gene Watkins recognized at the preliminary hearing in this matter, Cbeyond agreed "not to apply any fast track proceeding in this case." Ex. 17 at 14. Thus, Cbeyond has contractually waived its right bring a fast-track challenge, including a challenge based on section 13-514(10).

V. Counts Two, Three and Four Should All Be Dismissed for Failure To State A Claim Upon Which Relief Can Be Granted.

Section 13-801. In Count Two of its Complaint, Cbeyond alleges that AT&T Illinois violated section 13-801(g) of the PUA, which provides that "[i]nterconnection, collocation,

network elements, and operations support systems shall be provided by the incumbent local exchange carrier to requesting telecommunications carriers at cost based rates." 220 ILCS 5/13-801(g). Cbeyond does not allege, however, that the CCC rates AT&T Illinois has imposed on Cbeyond are anything other than "cost-based" rates. Indeed, the Complaint alleges that the cost-based rate for CCC was established in Docket No. 02-0864. *See* Complaint ¶ 9. Instead, Cbeyond's Complaint challenges whether the CCC rate should be applied at all when Cbeyond purchases a DS1 or requests the "rearrangement" of a DS1 EEL. Thus, Count Two fails to state a claim for violation of section 13-801.

Section 9-250. In Count Three of its Complaint, Cbeyond asks this Commission to investigate AT&T Illinois' application of the CCC rate. Complaint ¶¶ 47-49. Cbeyond asserts that section 9-250 allows the Commission to investigate AT&T Illinois' rates, charges and practices and "impose rates, charges and practices that are just and reasonable." *Id.* ¶ 49. But the Commission has no authority to do what Cbeyond requests. As explained above (*see supra* Section III), this Commission does not have authority to modify the approved, binding ICA between AT&T Illinois and Cbeyond to order different rates, charges or practices than those specified in the ICA. If this Commission finds that AT&T Illinois has *breached* the ICA (which AT&T Illinois has not), then it may order AT&T Illinois to comply with the contract. But it may not order any changes to the rates, charges or practices set forth in the ICA. Cbeyond's claim under section 9-250 therefore must be dismissed.

Breach of ICA. In Count Four of its Complaint (¶¶ 50-54), Cbeyond alleges that "AT&T Illinois' misapplication of the CCC rate is a breach of the parties' Interconnection Agreement." *Id.* ¶ 51. But Cbeyond fails to identify any specific provision that AT&T has allegedly breached. This is the same problem that repeatedly arose in Docket No. 10-0188, with Cbeyond first failing

to identify any ICA provisions AT&T purportedly breached, and then, with each new round of briefing, identifying new and different provisions of the ICA and federal law that were ultimately demonstrated to be irrelevant. *See* Ex. 5 at 5 (chart showing Cbeyond's shifting theory of the case). The Commission should not allow Cbeyond to repeat those tactics here. To state a claim for breach of contract, a complainant must plead "with the requisite degree of factual specificity" necessary to show the contractual basis of its claim. *OnTap Premium Quality Waters, Inc. v. Bank of Northern Illinois, N.A.*, 262 Ill. App. 3d 254, 259 (2d Dist. 1994). Allegations that "state[] no more than a legal conclusion" are insufficient. *Id*. (in breach of contract action, plaintiff failed to plead facts supporting argument that defendant accepted plaintiff's contractual counteroffer). *See also Alton & S.R. Co. v. Illinois Commerce Comm'n*, 316 Ill. 625, 630 (Ill. 1925) (a complaint filed in the Commission "must [include] a statement of the thing which is claimed to be wrong sufficiently plain to put the carrier upon its defense").

Some of the allegations in Count Four are so incredibly vague that they obviously fail to state a claim, such as the allegation that "numerous other terms of the ICA may be implicated in this case." Complaint ¶ 53. Other allegations, at first glance, suggest a claim, but upon any examination, it is obvious that no actual breach has been alleged. In paragraph 51, Cbeyond alleges that AT&T Illinois has violated "the provisions of the TRO/TRRO Amendment requiring that DS1 transport, loops and EELs be provided 'in accordance' with 47 C.F.R. § 51.319 et seq." Complaint ¶ 51. But Cbeyond does not identify which provisions of the TRO/TRRO Amendment contain this requirement and, even more confusingly, fails to identify any particular requirements in (the extremely long and detailed) 47 C.F.R. § 51.319 "et seq." with which AT&T Illinois has failed to comply.[9] Cbeyond also alleges in paragraph 51 that AT&T Illinois

[9] To the extent that this allegation states a claim, that claim has already been rejected by the Commission in Docket No. 10-0188. In that docket, Cbeyond argued that "AT&T must provide nondiscriminatory access to Unbundled

breached "Article 9 requiring the provision of UNEs at just and reasonable rates 'in accordance' with the federal Telecommunications Act of 1996." Complaint ¶ 51. Again, Cbeyond does not identify any particular part of "Article 9" or specify which of the hundreds of provisions and requirements in the 1996 Act AT&T is not "in accordance" with.

Taken together, the Complaint's allegations of breach of contract leave AT&T Illinois with no way of determining which ICA provisions Cbeyond is relying on. Cbeyond's claim for breach of interconnection agreement therefore should be dismissed.

VI. The Interconnection Agreement Bars Cbeyond's Prayer For Damages, Attorneys Fees and Costs.

In its Prayer for Relief, Cbeyond requests a range of remedies, including damages, attorneys fees, and costs. But in the ICA, Cbeyond expressly waived its right to seek these remedies – whether through an action for breach of the ICA, or an action premised on a violation of state or federal statutes.

Construction of the parties' ICA is governed by principles of Illinois state law. *See, e.g.*, *Illinois Bell Tel. Co., Inc. v. Global NAPs Illinois, Inc*., 551 F.3d 587, 589-90 (7th Cir. 2008) (claim for breach of ICA is based on state law); *Southwestern Bell Tel. Co. v. Pub. Util. Comm'n of Texas*, 208 F.3d 475, 485 (5th Cir. 2000) ("[interconnection] agreements themselves and state law principles govern the questions of interpretation of the contracts and enforcement of their provisions"). Under Illinois law, "[a]n unambiguous limitation on liability" contained in a contract "should be fully enforced" by the court or agency charged with its interpretation.

Dedicated Transport in accordance with 47 C.F.R. 51.319(e)(2)," and cited TRO/TRRO Attachment section 3.1.4 (DS1 Transport) and 3.1.5 (DS3 Transport). Ex. 1 at 9. The Commission explicitly rejected this claim, finding that the FCC's rules and TRO/TRRO Attachment sections 3.1.4 and 3.1.5 "do not apply to EEL rearrangements." *Id*. at 32.

Creamer v. State Farm Mut. Auto. Ins. Co., 161 Ill. App. 3d 223, 224 (3d Dist. 1987).[10] "The rationale supporting enforcement in Illinois of such [limitation of liability] provisions is the broad public policy permitting competent parties to contractually limit their respective liability and to allocate business risks in accordance with their business judgment." *Chicago Steel Rule & Die Fabricators Co. v. ADT Sec. Sys., Inc*., 327 Ill. App. 3d 642, 645-46 (1st Dist. 2002) (quoting *Rosenstein v. Standard & Poor's Corp.,* 264 Ill. App. 3d 818, 826-27 (1993)) (quotation marks omitted). Thus, the only time that limitation of liability clauses will not be enforced is where they do not "clearly spell[] out the intention of the parties," where there is something "in the social relationship between the parties militating against enforcement," or where they are "against public policy." *Id*. at 645.

In at least two places in the ICA, Cbeyond expressly agreed to limit its remedies and AT&T Illinois' potential liability. In section 1.7.1.2 of the ICA's General Terms and Conditions, Cbeyond agreed, in relevant part:

> [E]ach Party's liability to the other Party for any Loss relating to or arising out of such Party's performance under this Agreement, including any negligent act or inadvertent omission, whether in contract, tort or otherwise, including alleged breaches of this Agreement and *causes of action alleged to arise from allegations that breach of this Agreement also constitute a violation of a statute*, including the [1996] Act, shall not exceed in total the amount SBC ILLINOIS or CLEC has charged or would have charged to the other Party for the affected Interconnection, Resale Services, Network Elements, functions, facilities, products and service(s) that were not performed or were improperly performed. *"Loss" is defined as any and all losses, costs (including court costs), claims, damages (including fines,*

[10] *See also Sheffler v. Commonwealth Edison Co*., No. 1-09-0849, 2010 WL 743883, at *15 (1st Dist. Feb. 26, 2010) (electric power consumers' claim against power company for money damages resulting from allegedly untimely response to power outage was barred by power company's filed tariff, which excluded liability for non-willful and non-negligent failures to supply electricity), *aff'd*, *Sheffler v. Commonwealth Edison Co*., No. 110166, 2011 WL 2410366, at *9 (Ill. June 16, 2011) ("Because plaintiffs' complaint implicates the [limitation of liability] provision of ComEd's tariff, the tariff controls according to its terms and bars plaintiffs' third amended complaint. Therefore, the appellate court properly affirmed the dismissal of that complaint with prejudice."); *North River Ins. Co. v. Jones*, 275 Ill. App. 3d 175, 185-86 (1st Dist. 1995) (limitation of liability clause in tariff that telephone company filed with Commission, which limited carrier's liability for damages resulting from service interruptions, was defense to action brought by fire insurers).

penalties, and criminal or civil judgments and settlements), injuries, liabilities and expenses (including attorneys' fees).

Ex. 18, §1.7.1.2 (emphasis added).

In addition, in section 1.7.2 of the ICA's General Terms and Conditions, Cbeyond and AT&T Illinois agreed that neither party would be entitled to collect consequential damages. That section provides, in relevant part:

1.7.2 No Consequential Damages

1.7.2.1 *NEITHER CLEC NOR SBC ILLINOIS WILL BE LIABLE TO THE OTHER PARTY FOR ANY INDIRECT, INCIDENTAL CONSEQUENTIAL, RELIANCE, OR SPECIAL DAMAGES SUFFERED BY SUCH OTHER PARTY* (INCLUDING WITHOUT LIMITATION DAMAGES FOR HARM TO BUSINESS, LOST REVENUES, LOST SAVINGS, OR LOST PROFITS SUFFERED BY SUCH OTHER PARTIES), REGARDLESS OF THE FORM OF ACTION, WHETHER IN CONTRACT, WARRANTY, STRICT LIABILITY, OR TORT, INCLUDING WITHOUT LIMITATION, NEGLIGENCE OF ANY KIND WHETHER ACTIVE OR PASSIVE, AND REGARDLESS OF WHETHER THE PARTIES KNEW OF THE POSSIBILITY THAT SUCH DAMAGES COULD RESULT. EACH PARTY HEREBY RELEASES THE OTHER PARTY (AND SUCH OTHER PARTY'S SUBSIDIARIES AND AFFILIATES, AND THEIR RESPECTIVE OFFICERS, DIRECTORS, EMPLOYEES, AND AGENTS) FROM ANY SUCH CLAIM. . . .

Ex. 18, § 1.7.2 (emphasis added).

Thus, pursuant to the ICA, the only remedy to which Cbeyond could possibly be entitled would be a credit for the amount that Cbeyond alleges AT&T Illinois overcharged it for providing CCC. Applying Illinois law, the Commission must enforce the limitation of liability provisions contained in sections 1.7.1.2 and 1.7.2 of the parties' ICA. Cbeyond and AT&T Illinois, two sophisticated companies operating at arms' length and assisted by counsel, used the limitation of liability clauses to allocate their business risks in the way they saw fit. Cbeyond knew at the time it agreed to those provisions that it was waiving its right to consequential damages, costs and fees. Cbeyond cannot simply ignore those provisions now. The Commission should therefore strike from Cbeyond's Complaint its requests for "direct, proximate and

consequential damages, attorney fees and all other costs associated with bringing [its] action." Complaint at 16.

Finally, Cbeyond's request for attorneys fees, costs and a penalty reflects remedies only available under the fast-track statute. *See* 220 ILCS 5/13-516. Because Cbeyond contractually agreed not to file a fast-track complaint to challenge the charges already at issue in Docket No. 10-0188, Cbeyond is barred from requesting attorneys fees, costs or penalties, at least as related to the Category 1 charges.

Conclusion

For the reasons explained above, Cbeyond's Complaint should be dismissed in full.

Dated: November 18, 2011 /s/ Nissa J. Imbrock

CERTIFICATE OF SERVICE

I, Nissa J. Imbrock, an attorney, certify that a copy of the foregoing VERIFIED MOTION TO DISMISS CBEYOND'S REQUEST FOR DECLARATORY RULING AND FORMAL COMPLAINT was served on the following Service List via U.S. Mail and/or electronic transmission on November 18, 2011.

/s/ Nissa J. Imbrock

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